Filed 1/17/18 P. v. Cavalier CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MARCOS CAVALIER, Defendant and Appellant.	D071517 (Super. Ct. No. SCN350362)

APPEAL from a judgment of the Superior Court of San Diego County, Timothy M. Casserly, Judge. Affirmed as modified with directions.

Cathryn Lintvedt Rosciam, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler and Julie L. Garland, Assistant Attorneys General, Collette C. Cavalier and Adrian R. Contreras, Deputy Attorneys General, for Plaintiff and Respondent.

Marcos Cavalier pleaded guilty to smuggling a controlled substance into jail. (Pen. Code,[1] 4573.) The People dismissed three charges of possession of drugs and drug paraphernalia as well as charges in a different case (case No. SCN350153) with a waiver under *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*). The court suspended imposition of sentence and granted probation for three years, adding conditions that are the subject of this appeal. First, the court ordered Cavalier to submit his person, vehicle, residence, property, personal effects, computers and recordable media devices for search at any time with or without a warrant (condition 6n). Second, based on the *Harvey* waiver, the court imposed a $615 drug program fee. (Health & Saf. Code, § 11372.7.) Third, and again based on the *Harvey* waiver, it imposed a $205 laboratory analysis fee. (Health & Saf. Code, § 11372.5.)

Cavalier contends condition 6n is overbroad, unreasonable, and/or violates his constitutional rights. He further contends that both fees were improper because under *Harvey*, he was not "convicted" under the corresponding statutes.

The People have moved to dismiss the appeal, contending it is untimely as Cavalier did not appeal the original judgment; rather, following Cavalier's probation violations, the court has reinstated the same conditions five times. Cavalier concedes he has appealed only the most recent imposition. Although we conclude his claims are untimely, in the interest of justice we exercise our discretion to address the issues on the

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1 All statutory references are to the Penal Code unless otherwise stated.

merits. We order the drug program and the laboratory analysis fees stricken, and otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND[2]

The probation officer recommended a three-year grant of probation for Cavalier, adding: "Because [Cavalier] has what can be considered a severe addiction to illicit substances, Probation recommends that he be order[ed] to attend and complete a residential drug treatment program. A [Fourth Amendment] waiver, full-time work or school, full substance abuse and alcohol abuse conditions are recommended."

The probation officer recommended various conditions of probation, including that Cavalier obtain probation officer approval as to his residence (condition 10g), and condition 6n. The probation officer additionally recommended some alcohol and marijuana conditions, specifically, that Cavalier not knowingly use or possess alcohol if directed by his probation officer (condition 8b) or be in places other than in the course of employment where alcohol is the main item for sale (condition 8h), and that Cavalier submit to chemical testing for blood alcohol content upon request (condition 8f).

The probation officer evaluated Cavalier under the COMPAS (Correctional Offender Management Profiling for Alternative Sanctions) assessment tool. The assessment found Cavalier "is likely to have a better chance of success in the community

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2 The factual basis for the plea is that in September 2015, Cavalier "knowingly and unlawfully brought a controlled substance into a jail facility—useable quantity of methamphetamine." Additional background facts regarding the underlying conviction are not relevant to the issues on appeal.

if [he] is managed on formal probation with intensive monitoring and case planning to address identified needs."

The probation officer summarized Cavalier's criminal record: "[Cavalier] has a lengthy history dating back to 1996. As a juvenile, [he] has four prior felony true findings resulting in a commitment to [a juvenile facility]. As an adult, [he] has eight prior felony convictions and two prior misdemeanor convictions. He has also been granted probation on six occasions. Despite prior court ordered sanctions to include prison sentences, it has done little to alter [Cavalier's] behavior. In light of the above information coupled with [Cavalier's] continued criminality, his prior performance on probation can be classified as poor."

Cavalier concedes he did not appeal from the original judgment or from four other impositions of the same probation conditions: "Following the initial grant of probation, Cavalier admitted he was in violation of his probation on four occasions . . . . The violations were for failing to report to probation, and on February 17, 2016, for failing to register as a narcotics offender. . . . Each time the court revoked and reinstated probation and ordered the same probations conditions to remain in effect. . . . Cavalier did not appeal the initial grant of probation, nor any of the four subsequent violations. [¶] On October 28, 2016, Cavalier was alleged to have violated his probation a fifth time, for failing to follow the directions of the probation officer; specifically, for leaving the probation office without providing the requested urine sample for drug testing."

Under the circumstances, we regard Cavalier's challenge to the probation conditions as untimely. "A criminal appeal must generally be filed within 60 days of the

making of the order appealed. . . . [¶] An order granting probation and imposing sentence, the execution of which is suspended, is an appealable order. . . . [¶] In general, an appealable order that is not appealed becomes final and binding and may not subsequently be attacked on an appeal from a later appealable order or judgment. [Citation.] Thus, a defendant who elects not to appeal an order granting or modifying probation cannot raise claims of error with respect to the grant or modification of probation in a later appeal from a judgment following revocation of probation." (*People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1420-1421.)

We nonetheless address Cavalier's contentions on the merits to address a constitutional issue and correct a legal error regarding the fees imposed. "[O]bvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings are not waivable." (*People v. Smith* (2001) 24 Cal. 4th 849, 852.)

DISCUSSION

I. *Computers and Recordable Media Search* (*Condition 6n*)

A grant of probation " 'is not a right, but a privilege' " (*People v. Moran* (2016) 1 Cal.5th 398, 402) and a trial court has broad discretion to choose probation in sentencing a criminal offender. (*Ibid*.) Reviewing courts defer to the superior court's choice absent a manifest abuse of that discretion. (*Ibid*.)

"When an offender chooses probation, thereby avoiding incarceration, state law authorizes the sentencing court to impose conditions on such release that are 'fitting and proper to the end that justice may be done, that amends may be made to society for the

breach of the law, for any injury done to any person resulting from that breach, and . . . for the reformation and rehabilitation of the probationer.' (§ 1203.1, subd. (j).) Accordingly, . . . a sentencing court has 'broad discretion to impose conditions to foster rehabilitation and to protect public safety pursuant to . . . section 1203.1.' [Citation.] But such discretion is not unlimited: '[A] condition of probation must serve a purpose specified in the statute,' and conditions regulating noncriminal conduct must be ' "reasonably related to the crime of which the defendant was convicted or to future criminality." ' " (*People v. Moran*, *supra*, 1 Cal.5th at pp. 402-403.) The California Supreme Court has stated that a probation condition " 'will not be held invalid unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality." ' " (*People v. Olguin* (2008) 45 Cal.4th 375, 379, quoting *People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*); *People v. Trujillo* (2017) 15 Cal.App.5th 574, 583 (*Trujillo*), review granted Nov. 29, 2017, No. S244650; *In re J.B.* (2015) 242 Cal.App.4th 749, 754.) A reviewing court can invalidate the condition only if all three prongs—referred to as the *Lent* factors—are met. (*Olguin*, at p. 379.)

A reviewing court can also invalidate probation conditions if they are unconstitutionally overbroad, that is, if they impose limitations on a person's constitutional rights that are not closely tailored to the purpose of the condition. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 890; *People v. Stapleton* (2017) 9 Cal.App.5th 989, 993.) " 'A restriction is unconstitutionally overbroad . . . if it (1) "impinge[s] on constitutional rights," and (2) is not "tailored carefully and reasonably related to the

compelling state interest in reformation and rehabilitation." [Citations.] The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.' " (*Stapleton*, at p. 993; *People v. Appleton* (2016) 245 Cal.App.4th 717, 723.)

Appellate courts generally review probation conditions for abuse of discretion. (*People v. Moran*, *supra*, 1 Cal.5th at p. 403; *People v. Appleton*, *supra*, 245 Cal.App.4th at p. 723.) "That is, a reviewing court will disturb the trial court's decision to impose a particular condition of probation only if, under all the circumstances, that choice is arbitrary and capricious and is wholly unreasonable." (*Moran*, at p. 403.) But constitutional challenges, such as a claim that a condition is overbroad, are reviewed de novo. (*People v. Stapleton*, *supra*, 9 Cal.App.5th at p. 993; *Appleton*, at p. 723.)

Cavalier contends the court erred by imposing probation condition 6n to the extent it requires him to submit his "computer and recordable media" to search at any time with or without a warrant, and with or without probable cause, when required by his probation officer or a law enforcement officer. Comparing his case to *In re P.O.* (2016) 246 Cal.App.4th 288 and distinguishing *People v. Ebertowski* (2014) 228 Cal.App.4th 1170, in which the court upheld a similar condition in a case involving a gang related crime and defendant's admission to a gang allegation (*Ebertowski*, at pp. 1172-1173, 1176-1177), he maintains the condition is unreasonable under *Lent*. Cavalier further argues the condition is so overbroad as to impinge on his Fourth Amendment right to privacy.

The People argue in response that the condition is valid under *Lent* because it is reasonably related to reducing future criminality. According to them, in view of Cavalier's lengthy and violent criminal history as well as his poor performance on probation, the condition relates to Cavalier's supervision and rehabilitation by helping the probation department ensure he refrains from committing future crimes. The People further argue the electronics search condition is not overbroad because it allows the close supervision of probationers to ensure they comply with their probation terms, and thus is closely tailored to the compelling state interest in reforming and rehabilitating defendants.

This court recently addressed a challenge by a defendant subjected to an electronics search probation condition in *Trujillo, supra*, 15 Cal.App.5th 574, which we discuss in detail for its persuasive value. (Cal. Rules of Court, rule 8.1115(e)(1).) The defendant's crime in *Trujillo*, like Cavalier's here, had no relation to the probation condition, and the main issue as here was whether the condition was reasonably related to future criminality. We explained that "a probation condition 'that enables a probation officer to supervise his or her charges effectively *is* . . . "reasonably related to future criminality." ' [Citations.] Because the probation officer is responsible for ensuring the probationer refrains from criminal activity and obeys all laws during the probationary period, the court may appropriately impose conditions intended to aid the probation officer in supervising the probationer and promoting his or her rehabilitation. [Citations.] 'This is true "even if [the] condition . . . has no relationship to the crime of which a defendant was convicted." ' " (*Trujillo*, at p. 583.)

In *Trujillo*, the defendant's crimes were first-time offenses, but his record showed he had substantial risk factors relevant to reoffending, and we observed the trial court had imposed the condition aware of these facts and the probation department's conclusion that he was at risk and would require close supervision of his daily activities to support a successful probation. (*Trujillo, supra,* 15 Cal.App.5th at p. 583.) The trial court had found that in order to supervise the defendant, the probation department needed to be able to view the contents of his computer and cell phone, and thus we pointed out it "did not impose this condition as a matter of routine, but considered the specific facts relevant to Trujillo's case." (*Ibid*.) Under the circumstances, we held the court did not abuse its discretion: "If the court permits this young convicted felon to avoid prison through probation despite his violent offenses, the court has the authority to take steps to help ensure Trujillo will remain crime free and that public safety objectives are satisfied. As our high court has observed, the purpose of requiring Fourth Amendment search waivers as a probation condition is 'to determine not only whether [the probationer] disobeys the law, but also whether he obeys the law. Information obtained [from an unexpected and unprovoked search] afford[s] a valuable measure of the effectiveness of the supervision given the defendant . . . .' [Citations.] The trial court had a reasonable basis to conclude the most effective way to confirm Trujillo remains law-abiding is to permit his electronic devices to be examined, rather than relying on a meeting or a telephone conversation. This required Fourth Amendment waiver is not open-ended, it applies only during the probation period. If Trujillo is successful at his probation, the Fourth Amendment waiver will terminate and his electronic devices will again be completely private. The court

made the factual determination that the electronics-search condition is necessary to provide appropriate supervision for Trujillo while he is on probation. Under *Lent* and *Olguin*, the court did not err in reaching this conclusion." (*Id*. at pp. 583-584.)

We further rejected the notion that the *Trujillo* defendant's failure to use an electronic device in committing his crimes or the lack of any connection between such a device and the crimes rendered the search condition unreasonable as a matter of law. (*Trujillo, supra*, 15 Cal.App.5th at p. 584.) As we explained, whether a condition is reasonably related to reducing future criminality requires a focus on the particular facts and circumstances, not bright-line rules; that the propriety of a specific probation condition "necessarily depends on a myriad of tangible and intangible factors before the trial court, including the defendant's particular crime, criminal background, and prospects. It is for the trial court, with the assistance of the probation officer and other experts, to determine the probation conditions that will permit effective supervision of the probationer." (*Trujillo, supra,* 15 Cal.App.5th at p. 584.) And it was this court's role to decide whether the lower court had a reasonable factual basis to decide the condition would assist probation in supervising the defendant. (*Id*. at pp. 584-585.) In *Trujillo*, the facts supported the conclusion that the trial court's decision did have such a basis.

We are persuaded by *Trujillo's* reasoning and apply it in this case. *Trujillo*'s outcome did not turn on whether the trial court perceived the condition to be standard or routine, but rather on its finding—knowing the defendant's history and risk factors—that the condition was necessary to provide appropriate supervision for the defendant while he was on probation. Here, the trial court had before it the probation report recounting

Cavalier's lengthy criminal history and the probation department's conclusions as to the factors—Cavalier's history of non-compliance on probation and his criminal personality—that had to be addressed by the probation officers to reduce the chances of his reoffending. As in *Trujillo*, here the court had reasonable grounds to conclude that an effective way to confirm Cavalier remains compliant and law-abiding during his period of supervision is to permit his electronic devices to be examined, rather than merely relying on meetings or telephone conversations. Because the electronics search condition is reasonably related to Cavalier's supervision, it is reasonably related "to his rehabilitation and potential future criminality." (*People v. Olguin*, *supra*, 45 Cal.4th at p. 380.) We conclude the court did not abuse its discretion in ordering the condition under *Lent*, *supra*, 15 Cal.3d 481.

Following *Trujillo*, we reject Cavalier's argument that the electronics search condition is unconstitutionally overbroad as violating his fundamental privacy rights under *Riley v. California* (2014) 573 U.S. ___ [134 S.Ct. 2473]. Cavalier suggests we should follow the decisions invalidating the condition as overbroad in *People v. Appleton*, *supra*, 245 Cal.App.4th 723, and *In re P.O.*, *supra*, 246 Cal.App.4th 288. In *Trujillo*, we distinguished *Riley*, and followed authority explaining that the overbreadth analysis is materially different from the warrant requirement at issue in that case. (*Trujillo*, *supra*, 15 Cal.App.5th at p. 587.) We observed that probationers do not enjoy the absolute liberty to which law-abiding citizens are entitled, and that courts routinely uphold broad probation conditions permitting searches of a probationer's residence without a warrant or reasonable cause. (*Id*. at pp. 587-588.) Like the defendant in *Trujillo* (*id*. at pp. 588-

589), Cavalier does not challenge the probation condition authorizing officers to conduct random and unlimited searches of his residence at any time and for no stated reason, and he made no showing that a search of his electronic devices would be any more invasive than an unannounced, without-cause, warrantless search of his residence. Here, as in *Trujillo*, the factual record supports a conclusion that the electronics-search condition is necessary to protect public safety and to ensure Cavalier's rehabilitation during his supervision period, and a routine search of Cavalier's electronic data "is strongly relevant to the probation department's supervisory function." (*Id*. at p. 588.) We adopt a similar conclusion as *Trujillo*: "Absent particularized facts showing the electronics-search condition will infringe on [Cavalier's] heightened privacy interests, there is no reasoned basis to conclude the condition is constitutionally overbroad or to remand for the court to consider a more narrowly-drawn condition." (*Id*. at p. 589.)

II. *Fees Imposed Are Improper*

As the parties agree, the *Harvey* waiver allows the sentencing court to consider the facts of the dismissed charges in exercising its sentencing discretion regarding the charges for which a person has been convicted. (*People v. Munoz* (2007) 155 Cal.App.4th 160, 167.) The waiver is not the same as a conviction, and cannot be considered as such in sentencing. (*People v. Myers* (1984) 157 Cal.App.3d 1162, 1168.)

Health and Safety Code section 11372.7 authorizing the court to impose a drug fee requires a prior conviction under that statute. But Cavalier pleaded guilty only to one count under a different statute, Penal Code section 4573. Thus, the trial court did not have the authority to order that fee in this case.

For the same reason, the court had no authority to impose a laboratory analysis fee under Health and Safety Code section 11372.5. As we have discussed above, a *Harvey* waiver does not amount to a conviction.

DISPOSITION

The trial court is directed to strike the $615 drug program fee and the $205 laboratory analysis fee and amend the court's minutes accordingly. In all other respects the judgment is affirmed.

O'ROURKE, J.

I CONCUR:

NARES, Acting P. J.

AARON, J., Concurring in the result.

The appellant concedes that he failed to appeal from the original judgment or from four other subsequent proceedings in which the trial court imposed or re-imposed the same conditions of probation of which he complains in the present appeal. Under these circumstances, I would conclude that appellant has forfeited any challenge to the conditions and would not address the merits of his claims.

Further, for the reasons set forth in my concurring and dissenting opinion in *People v. Lynch* (Jan. 11, 2018, D071882) [nonpub. opn.], I disagree with the majority's analysis of the merits of the issues raised in this appeal.

I concur with the analysis in the remainder of the majority opinion.

AARON, J.